United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-2304

United States Court of Appeals

SECOND CIRCUIT

Docket No. 74-2304

RONALD LANDON,

Plaintiff,

—against—

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff" Seeking Joinder-Appellant,

—against—

GULF INSURANCE COMPANY,

Plaintiff or Defendant or Involuntary Plaintiff-Appellee.

PETITION OF A/S ARCADIA FOR REHEARING AND REHEARING *EN BANC*

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PETITION OF A/S ARCADIA FOR REHEARING AND REHEARING *EN BANC*

This court's opinion reaches essentially three conclusions, all of which, we submit, are serious error. We read the opinion to hold: (1) That the employer has a "lien" on the proceeds of suit of an injured employee against a negligent third party by virtue of Section 933(b) or the Supreme Court's decision in *Pope & Talbot* v. *Hawn* 346 U. S. 406 (1953); (2) That the employer *may have* an additional cause of action under *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.,* 394 U. S. 404 (1969) *but only if* the amount of the lien exceeds the amount of the judgment. This court consequently holds that since it *finds as a fact* that the lien will "generally" be less than the verdict, the employer or, as here, its insurer is not a proper Rule 19 party; (3) That the shipowner's position represents an attempt to obtain "the substantial equivalent of contribution" or partial indemnity and therefore, in this court's view, is contrary to the intention of Congress in enacting 1972 Amendments to the Act.

It is thus clear that the court has affirmed Judge Dooling's opinion on other grounds. Judge Dooling believed that 905(b) itself barred the relief sought because the "lien" was "such damages" of the employee, not the employer, a conclusion rejected by this court by its acknowledgment that incurred compensation liability is the damages of the employer's insurer.

I

Section 933(b) does not provide for a lien, *Ruggiero* v. *Rederiet for m/s Marion,* 308 F. Supp. 798 (SDNY 1970), but an assignment on conditions not present in the case. "Lien" and "assignment" are not equivalent terms.[1] The *Pope & Talbot* reference to 933(b) is *dictum*

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[1]Many compensation statutes provide a lien. See e.g. *The Consolidated Laws of New York, Annotated (McKinney's)*, Book 64, § 29 (New York); *West's Calif. Ann. Labor Code* §§ 3201, 3856(b) (California), which provide a lien by use of the word. The Court's footnote 3 is thus misleading. California, *Witt* v. *Jackson,* 57 Cal. 2d 57, 366 P. 2d 641 (1961), and New York, *Dole* v. *Dow Chemical Co.,* 30 N. Y. 2d 143 (1971), subject the lien to defeat by proof of employer negligence. This Court acknowledges that the "lien" is, of

in support of the holding that reduction of plaintiff's verdict by the amount of compensation paid would frustrate the purpose of protecting the employer, subject to absolute liability, from suits or claims by third parties. This holding was overruled by *Ryan Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 (1956) and *Burnside*, 394 U. S. at 413.

The "lien" concept and the idea of the employer's unrestricted right to its recovery must be considered in their historic place. Both were the result of the 1938 Amendment to 933(b), 52 Stat. 1168, which substituted the employer's right to sue upon payment of compensation pursuant to an "award" for the original right to sue upon payment of compensation. Payments under the Act are voluntary, § 914, and where no award had been entered it was universally believed that the employer had no right to sue to recover voluntary payments, leaving the employer without remedy at law. To rectify this situation courts of admiralty in discharge of their equity obligation created a "lien" (a classic equitable expression) on the proceeds of the employee's suit, *The Etna*, 138 F. 2d 37 (3 Cir., 1943), *Fontana* v. *Pennsylvania R.R. Co.*, 106 F. Supp. 461 (SDNY, 1952).

The Supreme Court first considered the implications of the 1938 Amendment in *American Stevedores* v. *Porello*, 330 U. S. 446 (1947) where the issue presented was whether the unamended "election" provision of 933(a) barred suit where compensation had been paid without an award, despite the amendment to 933(b) which appeared intended to broaden the employer's rights by allowing receipt of compensation without loss of right to sue. The Court reasoned (330 U. S. at 455) that a *blameless* employer would have motive to "force an award" if the election (i.e. receipt of) compensation barred suit by the employee.[2] That

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course, the damages of the employer and declined to hold that 905(b) itself barred the Rule 19 complaint.

[2]*Porello* also suggested that contribution might be available to the shipowner; see *In Re Seaboard Shipping Corp.*, 449 F. 2d 132, 138 (2 Cir., 1972).

is, to recover its compensation expenses, the employer would have been required to resist payment of compensation, cause an award (force the board to order it to do so), cause an assignment of the cause of action, and, by virtue of 933(d) and (e), deduct the sums paid from any recovery by suit or settlement.

In 1952 in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U. S. 282, the Court further realized that an employer *at fault* would also have motive to "force an award" since to do otherwise would mean liability for half the employee's damages, *Baccille* v. *Halcyon Lines,* 89 F. Supp. 765 (E. D. Pa., 1950), or loss of the "lien," *Baccille,* 187 F. 2d 403 (3 Cir., 1951). Justice Black expected the stevedore to force an award and collusively settle with the shipowner to the prejudice of an employee if his suit raised any issue of the employer's right to either recover its lien or respond for damages. *Ryan Stevedoring* v. *Pan Atlantic S.S. Corp.,* 350 U. S. 124, 144-147 (1956). *Thus* the *Halcyon* Court declined to fashion new rules of contribution,[3] treated the Act as an integrated whole and gave an unrestricted right to "lien" recovery.

But in 1956 the Court reversed course completely in *Ryan,* a case in which this court had granted the shipowner indemnity on the basis of active/passive negligence. *Ryan* was reheard on October 11-12, 1955. On October 24, 1955 the Court granted certiorari (350 U. S. 872) in *Czaplicki* v. *The Hoegh Silver Cloud,* 351 U. S. 525 (1956), clearly for the sole reason of deciding the impact of the new *Ryan* [illegible] of indemnity on the ability of the employer to force [illegible] In *Czaplicki* the Court held the assignment pro- [illegible] 933(b) inapplicable because of the conflict of [illegible]erest between the employee and employer; the Court thus *directly* faced the *real Halcyon/Pope & Talbot* issue for the first time.

What this court has done, however, is to restore the pre-*Ryan* result despite the vast body of intervening law post-*Ryan* opposed to a result granting a negligent steve-

[3]But see *United States* v. *Reliable Transfer Co.,* 43 LW 4610 (U. S. Supreme Court, #74-363, decided May 19, 1975).

dore recovery of its lien which developed because the law apparently understood that the stevedore, if vigilant, generally had the last and best opportunity to prevent a shipboard accident.

This court apparently believes its conclusion in part justified by *Cooper Stevedoring Co.* v. *Fritz Kopke Inc.*, 417 U. S. 106 (1974), which reaffirms the *Halcyon* rule of no contribution in a maritime personal injury case. In the light of *Cooper* this court must consider, realistically, the proper relative posture of the shipowner and stevedore since whoever is the *plaintiff* in a suit between the shipowner and stevedore over recovery of the "lien" must lose if negligent. The shipowner *does not* seek to assert a "counterclaim for [the stevedore's] concurrent negligence" but to force the stevedore to sue as the *owner* of the cause of action to recover compensation expenses, as the real party in interest and as a necessary party. We now turn to the court's unsuccessful attempt to distinguish *Burnside*.

II

Despite the lack of *any demonstration* in the record, this court finds as a fact that the "lien" will generally not exceed the verdict and bases its distinction of *Burnside* and its holding that the insurer is not a proper Rule 19 party *solely* on the ensuing conclusion that the shipowner, as a matter of *fact,* is not substantially likely to be subject to multiple or inconsistent liability. This is an invalid basis for distinction.[4] It is also factually inaccurate.

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[4]This court has yet offered no citation for the proposition that it is valid to deny *a* defendant recourse to the *protection* of Rules 19 and 17 if the defendant believes, *and can demonstrate,* that on the particular facts of *a* case any verdict is unlikely to exceed the "lien," simply because the court erroneously believes that "generally" it will not. To the contrary, the Supreme Court acknowledged the status of Czaplicki's employer's insurer as a Rule 19 party when the lien was $160.72! How this court can say that the Court's statement in *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 381-382 that a workmen's compensation insurer who pays a loss because the *"owner"* of the cause of action of the compensated employee is only dictum is indeed difficult to understand. The case was before the Court on the question whether the *subrogation* of the insurer by payment of the loss contravened the anti-*assignment* statute, proving that this court's footnote 3 blurring of the very real dif-

The "lien" *will* exceed verdict in a substantial number, if not *the majority* of minor injury new-act cases. This court has misgauged entirely the effect of the expansion of compensation benefits.[5]

This court has also misjudged the enormous impact of the seriously negative effect on settlements its holding will have. In fact it will *prevent* settlement where the lien exceeds one-half of the value of the third party suit. Assume that the plaintiff will settle for the real value of the third party case and for no less. Assume a case with a real value of $10,000 and a $5,000 compensation lien. This will cost the shipowner $10,000, $5,000 of which must be repaid to the stevedore in satisfaction of the "lien" even though the shipowner may have been only 1% negligent and the stevedore 99%, yet the latter escapes even its compensation obligation. But if the "lien" is $6,500, and plaintiff is willing to accept $3,500, the stevedore has an immediate *Burnside* right to sue for $3,000. From this follows the appalling prospect of a shipowner who *cannot,* within the holding of this case, settle any case where the lien is only 51% of the value of the third party claim. Such is the result which

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ference between rights obtained through *subrogation* and those obtained by *assignment* is basic error. Justice Black's dissent without opinion is an indication that he saw the *Aetna* holding as significant and inconsistent with his coming *Halcyon* rule.

[5]Since this court has essentially held on the basis of its estimate of relative size of the lien that the insurer is not a Rule 19 party, contrary facts should be brought before the Court. (1) In our informed opinion, prior to the 1972 amendments the "lien" in a non-serious injury case was approximately 40% of the net settlement; (2) Now benefits can be nearly four times the former $70/week maximum for temporary total disability, § 906(b)(1)(D); (3) In New York the Act is so liberally construed that on application an injured employee *always* obtains an "award" for permanent partial disability, even in a no-lost time case; (4) Benefits for partial disability are a factor of "weeks" i.e., the "award" is also now based on the expanded benefits, § 908(e). A case of a modest, by the board's standards, 10% permanent partial loss of use of the right arm following 10 weeks lost time can now result in a lien of $250 × 10 + 250 × 31.2 or $10,300, without medical expenses; (5) With the expanded benefits will come an increased motivation for the injured employee to stay out of work, aided by the new free choice of physician, § 907(b). What is this court's experience? Will a "lien" four or five times what it used to be still be generally less than the verdict?

follows the mistake of subjecting only two of the three interested parties to the consequences of their negligence.[6]

This court also holds that the insurer's interest "is not in the litigation between the parties, but in plaintiff's recovery," that "If the recovery . . . is for less than . . . the . . . lien, the damages to the employer . . . will have to be reduced *pro tanto*" and that "[t]he employer is not a necessary party . . . because it has no claim until the plaintiff has recovered against the ship." But "at worst the employer [should this be shipowner?] might be liable in an independent cause of action, for an excess above the . . . lien [does the court mean judgment?]."

All these conclusions ignore *Burnside* which holds *squarely* that the stevedore has its own, independent, viable cause of action before judgment for plaintiff, which is not cut off or controlled by 933(b).[7] Of course, *Burnside* was an odd case factually, but the Court nowhere suggested that the rule announced applied to those facts only. But the question is not "what claim has the stevedore" but

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[6]Even if the "lien" is more modest than anticipated, settlement is ill advised if there is substantial evidence of plaintiff's contributory negligence. Also, if there is concurring negligence of the stevedore the following obtains:

Such negligence bars the *Burnside* right by virtue of *Halcyon;* In the second example the stevedore gains $3,500 without reference to its negligence, according to this court. But such negligence defeats the claim for $3,000, the difference between the settlement and the "lien" and this court's holding gives the *stevedore* the substantial equivalent of contribution from the *shipowner.* Will the Supreme Court accept this result?

It is likely that the stevedore will be unwilling to settle its "lien" claim for the sum of $3,500, despite convincing evidence of its negligence. The stevedore will want the plaintiff's case tried so that it may be fully reimbursed out of the verdict.

[7]That the "lien on proceeds" interpretation depends on a holding that 933(b) cuts-off the employer's cause of action against a negligent third party is demonstrated forcefully by the opinion of the District of Columbia Court of Appeals in *Joyner* v. *F & B Enterprises, Inc.,* 448 F. 2d 1185 (1971). Joinder of the employer on the basis of the defense that plaintiff was not the real party in interest to the amount of the "lien" was held improper; since the employer's interest was a lien on proceeds of plaintiff's suit *only* because of the assumed effect of 933(b). It cannot be denied that *Burnside* invalidates this distinction, upon which the Court of Appeals wholly relied to vary the acknowledged rule of common law that *pro tanto* ownership passes by subrogation [i.e., substitution].

"what defense has the shipowner." Can one avenue of recovery be defendable while the other not? But we have not reached the major flaw in the opinion.

This court suggests that 905(b) overruled *Burnside,* a question which it holds it need not decide.

As was stated in the main brief (pp. 13-15) it is likely that 905(b) did, in fact, overrule *Burnside,* but to reach this conclusion it is mandatory to decide first that the "otherwise entitled" provision of the new section 905(b) includes the employer. We believe that this argument is a simple one.

All remedies of all potential plaintiff's with claims against shipowners are not, of course, controlled by Section 905(b). This provision of a Workmen's Compensation Statute does not, for example, overrule the Carriage of Goods By Sea Act, and the shipowner still owes cargo interests a seaworthy vessel at the commencement of the voyage. Obviously 905(b) applies only to those defined by provision of the Act itself. If the employer is "otherwise entitled" to sue the shipowner for negligence by virtue of 905(b), *Burnside* is overruled because the Supreme Court in *Burnside* itself at 394 U. S. 412-413 has said so, since obviously sufficient langauge is present in 905(b) cutting off all other remedies. This would mean, of course, that if "otherwise entitled" includes the stevedore/employer, then the stevedore *must sue* if it is to recover its compensation expenditures—*a lien on proceeds of the employee's suit is indisputably such "other remedy" cut off by the Act itself.* If the stevedore is "otherwise entitled" the "lien" is dead, despite what the Supreme Court has *even said* was the stevedore's proper interest in recovery of its compensation liability.

Section 905(b) works two ways, both beneficial to the shipowner as far as concerns this issue: (1) *Burnside* survives 905(b) if the stevedore is not otherwise entitled; (2) if, however, the stevedore is otherwise entitled, the remedy of a lien on proceeds is cut off.

Rehearing would seem mandatory if only to give this court an opportunity to consider what is properly the

threshold issue—the effect of 905(b) on the right of the stevedore/employer to recover its compensation liability *irrespective of all prior case law.* Conceptually the court's opinion is incomplete if the effect of 905(b) on the right to recover the "lien" is left undecided. As the court suggests, 905(b) does not specifically exclude the stevedore from the class of plaintiff's defined. The statement of purpose accompanying the amending bills in both Houses of Congress included a declaration that the stevedore/employer was to continue to bear the cost of unsafe conditions. Moreover, 905(b) was drawn in contemplation of resolving at least certain of the relative rights and duties of the employee, shipowner and employer, and it thus cannot be said that the "otherwise entitled" provision does not include the stevedore which is certainly not an "unrelated third party." See *Galim* v. *Jetco, Inc.*, decided March 31, 1975 (2 Cir.), Slip op. 601, p. 2649.

III

This court suggests that the shipowner seeks to evade the result intended by Congress in enacting 905(b). The opinion acknowledges that incurred compensation liability is not "such damages" of the employee and that the shipowner does not attempt to shift liability for the damages of the plaintiff to his employer. Hence, 905(b) itself does not bar the relief sought. Legislative documents accompanying the amending bills contained the statement that the employer was to bear the cost of unsafe conditions, to provide incentive to maintain the "fullest measure of on-the-job safety."

But this court ignores this statement of Congress' intention in reaching a result which truly distorts the purpose of the enactment. The employer escapes the cost of compensation if 99% negligent if, fortuitously, a third party is 1% so. Does this result assure that the employer will bear the cost of the condition causing the accident when this court concludes "we read the emphasis in whole or in part to mean to exclude liability by the employer to any extent including the amount of compensation payments?" But what damages are referred to in the legislative documents cited by this court? *Obviously the damages of the*

employee! But if the "lien" is the stevedore's damages, a proposition to which this court assents, since at least in case of a shortfall the employer may sue to recover "its damages," what place has a reference to a statement by Congress concerning liability for plaintiff's *actual* damages?

Judge Dooling's reasoning, although wrong, was consistent. He concluded that "such damages" included the "lien" despite *Burnside*. This is the *only* avenue to the result which this court obviously intends.[8] It is clear that a brake on "third party" litigation was intended by Congress. The fear of resumption of some "third party" litigation cannot be so exaggerated as to lead this court to an unfair, unworkable and inconsistent result because to subject the lien to defeat by proof of stevedore negligence would, in our opinion, and we so represent to this court, curtail serious litigation over essentially unserious longshoreman's personal injury matters. Here is why.

If 905(b) applies to a stevedore which owns that part of plaintiff's claim representing compensation paid (*United States* v. *Aetna Surety Co.,*), if *Halcyon* is good law on its facts (*Cooper Stevedoring Co.* v. *Fritz Kopke Inc.,*) i.e. if the stevedore's claim is defeated by proof of negligence, if but 1% concurring negligence is sufficient to bar its recovery (*Hartnett* v. *Reiss Steamship Co.,* 421 F. 2d 1011 (2 Cir., 1970)), if the vastly increased benefits available through liberal interpretation of the Act are as large or nearly as large as the potential verdict, or at least sufficiently so that the shipowner may make up the difference without the added burden of paying at least a like sum to a negligent stevedore, if this court will sanction, *where not inappropriate,* a stay of trial pending exhaustion of compensation remedies to maintain the present *status quo* where in the vast majority of cases benefits *are* exhausted *before* suit, if the motive of a plaintiff's attorney to sue despite a too large "lien" in hope of recovering a part of the "lien" for which

[8]Transfer of the stevedore's compensation liability to the shipowner is *not* the *quid pro quo* intended. As the court suggests in footnote 9, the exclusive liability of a negligent stevedore is restored but is it yet not liable even for compensation if the shipowner happens also to have been negligent? This windfall is *not* a *quid pro quo;* Congress intended the stevedore be free only of liability for plaintiff's actual damages.

he may expect a fee is removed,[9] what will happen to the volume of "small" injury cases in the district courts?

Finally, we ask the court to delete in discussion of the issue whether sole negligence of the shipowner must be established its mistaken conclusion that this point was urged by the shipowner on appeal. It *is,* of course, "strictly before [the court] on this interlocutory appeal" since it is *the* initial issue which must be decided. Obviously, as the court seems to realize, the shipowner's argument is moot if the law is *sole* negligence. We have not made the considerable if ill-executed effort that this appeal has entailed to argue inconsistent positions. This court should decide the issue, but without suggesting our sponsorship. Likewise we ask that footnote 10 be amended to remove the suggestion that this shipowner has made but another effort to float the very sinkable "Murray Credit" (Reply brief pp. 9, 10). The argument presented deserves at least that much respect.

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[9]See *Russo* v. *Flota Mercante Gran Columbiana,* 303 F. Supp. 1404 (1975) which stands for the primacy of the stevedore's "lien." The reason for Judge Mansfield's holding is now invalid. Irrespective of what the law may be, stevedores will covertly arrange for some compensation for the attorney if in a large lien/minor injury case he still brings suit. That he will have motive to do so is yet another effect of the opinion. Thus, as a third example if the "lien" is $8,000 and the claim worth $10,000, plaintiff will not accept $2,000 but will press his suit to judgment where his attorney might be entitled to a fee of $3,333.33. That this is a possibility is a classic demonstration of the importance of Rule 17.

We must therefore question the wisdom of this court's repeal of Rule 17(a) in cases of this type. A purpose of the rule "is to enable the defendant to avail himself of . . . evidence and *defenses* that . . . [it] has against the real party in interest . . ." (emphasis supplied). *Celanese Corp. of America* v. *John Clark Industries, Inc.,* 214 F. 2d 551, 556 (5 Cir., 1954); *Virginia Electric & Power Co.* v. *Westinghouse Electric Corp.,* 485 F. 2d 78, 84 (4 Cir., 1973) cert. denied, 415 U. S. 935. This court's reliance on *Pyle* v. *Kansas Gas & Electric Co.,* 23 FRD 148 (D. Kan. 1959) is entirely misplaced since the statute there at issue provided for a lien, *unlike* the Harbor Worker's Act. It appears *certain* that since *Burnside* permits the shipowner to defend against the employer's claim on the basis of *its* negligence, the purpose of Rule 17 is violated by the result reached which denies the shipowner such defense if suit is brought to recover the "lien" (as well as any *actual* damages) in the name only of the employee.